ATTORNEYS FOR APPELLANT:

JAMES E. O'GALLAGHER
DAVID A. MACK
Kopka, Pinkus, Dolin & Eads, P.C.
Crown Point, Indiana

ATTORNEY FOR APPELLEE:

JEFFREY S. STURM
George C. Patrick & Associates, P.C.
Crown Point, Indiana

IN THE COURT OF APPEALS OF INDIANA

WICKES FURNITURE CO.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 93A02-0710-EX-859
	)	
BORCE GORGIJOVSKI,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WORKER'S COMPENSATION BOARD
The Honorable Linda P. Hamilton, Chairman
Application No. C-152334

April 8, 2008

MEMORANDUM DECISION—NOT FOR PUBLICATION

BRADFORD, Judge.

Appellant-Defendant Wickes Furniture Company ("Wickes") appeals from the

decision of the Indiana Worker's Compensation Board ("the Board") awarding Appellee-Plaintiff Borce Gorgijovski medical expenses and temporary total disability benefits for injuries sustained during his employment. Upon appeal, Wickes raises several issues, one of which we find dispositive: whether the Board's findings of fact were inadequate to permit appellate review. Determining that the Board's findings do not contain the requisite specificity to permit meaningful review, we reverse and remand for proceedings consistent with this opinion.

FACTS

Gorgijovski was employed as a stock handler for Wickes on December 3, 1999. Part of his job duties included using lifts to load furniture onto a rack system that extended from the floor of the warehouse to the ceiling. In an attempt to fit a couch onto one of the lifts, Gorgijovski removed part of the lift that ordinarily would have been used to attach a safety harness. While loading the couch onto the racks, Gorgijovski lost his balance, causing him to fall thirty feet to the ground, resulting in his injury.

There is no dispute in the record that Gorgijovski was not wearing a safety restraint designed to prevent such accidents. There is also no dispute that, per company policy, restraints were to be worn at all times during operation of the lifts and that Gorgijovski was fully aware of this policy. There is some dispute, however, regarding Wickes's possible acquiescence to Gorgijovski's failure to wear a safety restraint. While company policy mandated that a violation of this rule was to result in immediate dismissal, Gorgijovski's prior documented failures to wear the required safety restraints had never resulted in dismissal. Some disagreement also exists regarding the feasibility of wearing the restraint on

this particular occasion.

Following the accident on December 3, 1999, Gorgijovski filed a worker's compensation claim and received disability benefits until January 7, 2001. On August 8, 2005, Gorgijovski's doctor determined that he had a sixteen percent impairment rating of the whole person. On January 26, 2006, a single hearing member conducted a hearing on Gorgijovski's claim for compensation and on March 8, 2007, issued the following relevant findings:

> 1. That [Gorgijovski] was an employee of [Wickes] on December 3, 1999.
> 2. That [Gorgijovski] suffered an accidental injury arising out of and in the course of his employment with [Wickes] on December 3, 1999 when he fell from a lift hurting his back and right hip.
> 3. That [Wickes] has raised certain affirmative defenses pursuant to [Indiana Code Section] 22-3-2-8, including failure to use a safety appliance, and failing to obey [a] reasonable written or printed rule.
> 4. That after weighing the evidence presented by [Gorgijovski] on the issues of affirmative defense, the Single Hearing Member finds that the weight of the evidence was for [Gorgijovski] on the issue of the affirmative defenses, and therefore finds for [Gorgijovski] and against [Wickes] on all of the affirmative defense issues, and, as a result, the defenses are not considered to be bars to compensation pursuant to [Indiana Code Section] 22-3-2-8.

Appellant's Appendix at 236-37.

Wickes applied for review by the full Board. After a hearing held on June 25, 2007, the Board adopted and affirmed the single hearing member's decision. This appeal follows.

DISCUSSION AND DECISION

We note that the findings listed above were first denominated by the single hearing member and later adopted by the Board. Upon a review of the evidence, the Board is free to adopt the single hearing member's decision and such practice is neither prohibited by statute nor judicially condemned. *Rork v. Szabo Foods,* 436 N.E.2d 64, 67 (Ind. 1982). It is

important, however, to reiterate that the single hearing member's decision is, by statute, a summary proceeding and "provides the [Board] with a vehicle by which it may fully utilize its members as single-person hearing officers, thereby expediting the processing and administration of claims." *Id.* The full Board, on the other hand, has a statutory duty to enter the findings of fact upon which its disposition is based and provide sufficient detail as to prevent arbitrary or hastily drawn decisions. *Id.*

1. Waiver

On appeal, Gorgijovski argues that Wickes has waived any right to challenge the sufficiency of the findings by failing to raise such issue before the full Board. It is well-established that failure to raise a claim before the full Board may result in a waiver of such claim on appeal. *Ind. Mich. Power Co. v. Roush*, 706 N.E.2d 1110, 1115 (Ind. Ct. App. 1999) (concluding that employer's failure to raise affirmative defense before either the single hearing member or the full Board resulted in waiver of the claim), *trans. denied*. However, where there has been no opportunity to raise such a claim, there can be no waiver of the right to review. *Goodyear v. Goodyear*, 441 N.E.2d 498, 500 (Ind. Ct. App. 1982) (observing that basic fairness prevents a court from affirming a judgment on a theory that opposing counsel was not permitted to address at the hearing).

Gorgijovski's argument presumes that Wickes's challenge to the sufficiency of the findings was available at the time of its application for review by the full Board. Yet, when the single member made its findings, there was no obligation on the part of the Board to accept those findings. Wickes would have had no opportunity to challenge the specificity of the Board's findings until such findings were made or accepted. Indeed, Indiana Code

section 22-3-4-6 (2006) establishes that the goal of the single hearing member's decision is to expedite claims for compensation and permits a single member of the Board to resolve the dispute between an employer and injured employee in "a summary manner." *See* Ind. Code § 22-3-4-6. On the other hand, Indiana Code section 22-3-4-7 (2006) specifically requires that the full Board make findings of fact on which its decision is based. Upon review of the evidence, the Board is permitted to reverse the decision of the single member, adopt its own findings, or adopt the findings of the single member. *See Bertoch v. MBD Corp.*, 813 N.E.2d 1159, 1160 (Ind. 2004) (reversing the decision of the single hearing member); *Rork* 436 N.E.2d at 68 (reaffirming the Board's power to draft findings or to adopt the findings of the single hearing member). Because the single member's decision was not binding, and Wickes is availing itself of its first opportunity to appeal the Board's findings, we reject Gorgijovski's argument that Wickes's claim is waived.

2. The Merits

The requirement that the Board enter specific findings has long been a part of Indiana law. As the Indiana Supreme Court established in *Perez v. U.S. Steel Corp.*, 426 N.E.2d 29, 32 (Ind. 1981),

> [w]e believe that both claimant and employer have a legal right to know the evidentiary bases upon which the ultimate finding rests. That responsibility initially lies with the administrative agency, who for that reason must enter specific findings of basic fact to support its finding of ultimate fact and conclusion of law. Parties will thereby be enabled to formulate intelligent and specific arguments on review. In turn, the reviewing court can expeditiously and effectively review the agency's determination; the integrity of that decision will be maintained by judicial review which is limited to these findings. Additionally, the statutory requirement serves to protect against careless or arbitrary administrative action. Answers to difficult questions may easily be stated, but the validity and respect to be accorded the answer lies in

> the rationale and facts upon which it is founded. The requirement that findings of basic fact be entered insures that a careful examination of the evidence, rather than visceral inclinations, will control the agency's decision.

(Citations omitted).

It is imperative that the Board provide findings that are specific enough to demonstrate to the court which facts the hearing judge relied upon and the reasoning used in reaching the ultimate decision. *Smith v. Henry C. Smithers Roofing Co.*, 771 N.E.2d 1164, 1168 (Ind. Ct. App. 2002). The Board, in effect, must provide a road map from which readers can clearly delineate the basis for their decision. *Van-Scyoc v. Mid-State Paving*, 787 N.E.2d 499, 506 (Ind. Ct. App. 2003). "'When the Board's findings are vague and incomplete, it results in guesswork on the part of the readers of the decision.'" *Smith*, 771 N.E.2d at 1168 (quoting *Outlaw v. Erbich Prods. Co.*, 758 N.E.2d 65, 68 (Ind. Ct. App. 2001)). Furthermore, "[t]he expertise of the [Board] . . . is lost when the findings are perfunctorily made, and the integrity of its decision is threatened when the reviewing court must search the record and speculate as to the Board's factual analysis and rationale." *Rork*, 436 N.E.2d at 69.

In *Smith*, where the pertinent issue was whether a pre-existing injury had caused the Plaintiff's pain, the Board simply stated, "[i]t is further found that plaintiff's condition … is not causally connected to the accidental injury herein but is in fact connected to his pre-existing condition." 771 N.E.2d at 1168. As a result, we concluded that it was impossible to determine from the findings whether the hearing judge "adequately considered, or considered at all, whether the accident aggravated Smith's pre-existing condition." *Id.* at 1169. Similarly, in *Roush*, the dispositive issue was whether the deceased had choked while in the course of employment. 706 N.E.2d at 1112. The Board's finding on this issue stated that

"the employee's act of choking . . . did constitute an accidental injury arising out of and in the course of his employment." Because of the lack of specificity, we were unable to ascertain whether a reasonable, prudent person would consider the choking to be incidental to employment. *Id.* at 1114; *see also Van-Scyoc*, 787 N.E.2d at 505 (holding that the conclusory findings did not sufficiently indicate the Board's reasoning regarding the evidence). Indeed, even the cases cited by Gorgijovski, specifically, *Wimmer Temporaries, Inc. v. Massoff*, 740 N.E.2d 886 (Ind. Ct. App. 2000), *trans. denied*, and *U.S. Steel Co. v. Mason*, 227 N.E.2d 694 (Ind. Ct. App. 1967) *trans. denied*, involve detailed findings explaining the basis for the Board's decision.

In light of *Smith*, *Roush*, and *Van Scyoc*, it is apparent that the findings in this case similarly do not rise to the level of specificity that Indiana courts generally require. Here the Board merely acknowledged Wickes's affirmative defenses and indicated its conclusion, without explanation, that the facts weighed in favor of Gorgijovski with respect to those defenses.

Such summary findings result in precisely the kind of judicial guesswork that the Indiana Supreme Court cautioned against. *Rork*, 436 N.E.2d at 69. We cannot tell from these findings what evidence the Board used in rejecting Wickes's affirmative defenses. The Board simply summarily stated that the evidence regarding defenses weighed in favor of Gorgijovski and against Wickes. There is ample evidence in the record indicating that Gorgijovski was aware of the company policy regarding safety restraints and that he, in fact, signed several documents indicating his knowledge of and intent to abide by the policy. There is also evidence indicating that Gorgijovski chose not to use the equipment on several

occasions despite warnings from his superiors. On the other hand, evidence exists indicating that it was not feasible to wear the requisite safety equipment and that Wickes had acquiesced to such behavior. We are simply left to speculate, however, because the Board's findings merely state a conclusion and do not demonstrate which facts were deemed reliable in reaching that conclusion. *See Wimmer*, 740 N.E.2d at 889-90 (demonstrating specific findings in outlining the precise factual basis for the Board's determination that the employer had acquiesced to the employees behavior). Accordingly, we reverse and remand to the Board with instructions to enter the specific findings of basic fact upon which its conclusions and award are based.

The decision of the Board is reversed, and the cause is remanded for proceedings consistent with this opinion.

BAKER, C.J., and DARDEN, J., concur.